FILED

97 • 597 SEP 25 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

MARIA NAVARRO,

Petitioner,

vs.

FUJI HEAVY INDUSTRIES, LTD.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

SHELDON A. BRENNER
Counsel of Record
JANE E. REAMES
BRENNER & MOLTZEN, LTD.
Attorneys for Petitioner
33 North Dearborn Street
Chicago, Illinois 60602
(312) 781-1970

47 pp

QUESTION PRESENTED

What is the standard of appellate review for trial court decisions excluding expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) in a summary judgment proceeding when the expert has never been deposed or voir dired by the trial court?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent company of any party to be listed.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

OPINIONS BELOW 1

JURISDICTION 2

RULES INVOLVED 2

STATEMENT OF THE CASE 2

A. The District Court's Ruling 2
B. The Court of Appeals' Affirmance 3

REASONS FOR GRANTING THE WRIT 4

I. THE CIRCUITS ARE SPLIT 4

II. THIS CASE WOULD HAVE BEEN DECIDED DIFFERENTLY IN ANY OTHER JURISDICTION 5

III. THE DECISION CONFLICTS WITH DECISIONS OF THIS COURT 9

IV. THE ISSUE IS IMPORTANT 10

CONCLUSION 10

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Seventh Circuit dated June 27, 1997 ..... 1a

Appendix B — Opinion and Order of the United States District Court for the Northern District of Illinois dated April 22, 1996 ..... 11a

Appendix C — Order of the United States District Court for the Northern District of Illinois dated August 20, 1996 ..... 26a

Appendix D — Rules Involved 28a

TABLE OF CITATIONS

Cases:

Ambrosini v. Labarraque, 966 F.2d 1464 (Fed. Cir. 1992) 8

Ambrosini v. Labarraque, 101 F.3d 129 (Fed. Cir. 1996) 9

American & Foreign Ins. Co. v. General Elec. Co., 45 F.3d 135 (6th Cir. 1995) 4

Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472 (1st Cir. 1997) 6

Bradley v. Brown, 42 F.3d 434 (7th Cir. 1994) 4

Claar v. Burlington Northern R. Co., 29 F.3d 499 (9th Cir. 1994) 8

Cortes-Irizarry v. Corporacion Insular De Seguros, 111 F.3d 184 (1st Cir. 1997) 5

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) . . . . . 3, passim

General Electric Company v. Joiner, 78 F.3d 524 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997) 4, 5, 8, 10

Gier v. Educational Service Unit, 66 F.3d 940 (8th Cir. 1995) 4

Goewey v. United States, 106 F.3d 390 (4th Cir. 1997) . . 7

Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) 6, 7

Guillory v. Domtar, 95 F.3d 1320 (5th Cir. 1996) 7

Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594 (9th Cir. 1996) 8

In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3d Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 115 S. Ct. 1253 (1995) 5, 7

Rizzo v. Corning Incorporated, 105 F.3d 338 (7th Cir. 1997) 9

Rosado v. Deters, 5 F.3d 119, 124 (5th Cir. 1993) 4

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997) 4

Surace v. Caterpillar, Inc., 111 F.3d 1039, 1043 (3d Cir. 1997) 7

United States v. Brown, 776 F.2d 397 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986) 4

United States v. Davis, 40 F.3d 1069 (10th Cir. 1994) 4

United States v. Dorsey, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995) 4

United States v. Sepulveda, 15 F.3d 1161 (1st Cir. 1993) 4

Wood v. Minnesota Mining and Mfg. Co., 112 F.3d 306 (8th Cir. 1997) 8

Rules:

Federal Rules of Evidence, Rule 702 . . . . . 2, 3

In The

Supreme Court of the United States

October Term, 1997

MARIA NAVARRO,

Petitioner,

vs.

FUJI HEAVY INDUSTRIES, LTD.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Maria Navarro, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the District Court is reported at 925 F. Supp. 1323 and is reproduced in the Appendix at A. 11a. The District Court's order denying petitioners Rule 59 motion is unpublished and reproduced in the Appendix at A. 26a. The opinion of the Court of Appeals is reported at 117 F.3d 1027 (7th Cir. 1997) and is reproduced at A. 1a.

JURISDICTION

The judgment of the District Court was entered April 22, 1996. A. 11a. The District Court denied plaintiff's Motion to Alter or Amend Judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure on August 20, 1996. A. 26a. The judgment of the Court of Appeals was entered on June 27, 1997. A. 1a.

RULES INVOLVED

Rules 104, 702, 703, and 704 of the Federal Rules of Evidence are reproduced at A. 30a.

STATEMENT OF THE CASE

Petitioner, a passenger in a motor vehicle, sued respondent in Illinois state court, alleging negligent design of a 1982 Subaru automobile manufactured in Japan. Petitioner claimed that the car's rear suspension was designed in such a way that it rusted through from the inside out and in such a manner that there was no visual clue that the suspension was about to give way. The rear suspension suddenly and without warning failed, causing the car to roll over several times and come to rest on top of plaintiff. The suit was removed to the United States District Court for the Northern District of Illinois.

The District Court under Rule 702, Fed. R. Evid., excluded expert testimony proffered by petitioner and granted respondent's motion for summary judgment. The Seventh Circuit affirmed.

A. The District Court's Ruling.

The District Court held that the affidavit of petitioner's expert was insufficient to scientifically establish (a) that the inner rear suspension fractured due to progressive corrosion

or (b) the standard of care in the industry at the time of manufacture and respondent's breach of it. In so holding, the court acting under Rule 702 of the Federal Rules of Evidence and citing this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), found that the affidavit of petitioner's expert was inadmissible and ruled that plaintiff could not establish a *prima facie* case.

After finding the absence of a *prima facie* case for negligent design, the District Court accepted respondent's argument that "the car simply wore out" and entered summary judgment in respondent's favor. A. at 24a, 25a. Petitioner moved for reconsideration under Fed. R. Civ. P. 59(e), which was denied. A. at 26a.

B. The Court of Appeals' Affirmance.

The Court of Appeals for the Seventh Circuit affirmed the entry of summary judgment, although it disagreed with the District Court on at two least points. First, the Court of Appeals found that there was no merit to respondent's argument that the Subaru vehicle "just wore out." A. 3a. On the record presented, the Court of Appeals "assume[d] that the design of the rear suspension was a cause of the accident, and a culpable cause if the design was defective." A. at 4a. The court found it noteworthy that respondent "did not present *any* evidence" and that petitioner's evidentiary materials, including her expert's affidavit, "were not presented in response to affidavits or other evidence in support of [respondent's] motion for summary judgment." A. at 5a (emphasis in original).

Second, the Court of Appeals found that petitioner's expert was an experienced consultant in the relevant fields, that he had inspected the ruined car and "had explained lucidly how the accident had come about—through the insidious corrosion of the rear suspension." A. at 6a.

The Court of Appeals affirmed summary judgment for respondent even "though there may be a common-sense suspicion, that the 1982 Subaru's rear suspension was defective." A. at 8a.

REASONS FOR GRANTING THE WRIT

This Supreme Court has granted certiorari in *General Electric Company v. Joiner*, No. 96-188, which is set for oral argument on October 14, 1997. *General Electric* presents the issue "[w]hat is the standard of appellate review for trial court decisions excluding expert testimony under *Daubert* . . . ?" This case presents a similar issue. Unlike *General Electric* or any other reported case petitioner has found, however, this petitioner's expert was never deposed by respondent or voir dired by the trial court and respondent had not retained any expert before discovery was closed.

I. THE CIRCUITS ARE SPLIT

The Circuits are split. Five Circuits in *Daubert* appeals apply a "manifestly erroneous" standard of review: *United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993); *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); *Rosado v. Deters*, 5 F.3d 119, 124 (5th Cir. 1993); *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 137 (6th Cir. 1995); *Bradley v. Brown*, 42 F.3d 434, 437 (7th Cir. 1994).

Five Circuits reviewing *Daubert* issues follow an abuse of discretion standard: *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995); *Gier v. Educational Service Unit*, 66 F.3d 940, 944 (8th Cir. 1995); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir. 1997); *United States v. Davis*, 40 F.3d 1069 (10th Cir. 1994).

Two Circuits have applied a heightened abuse of discretion standard, especially when expert testimony has been excluded: *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 115 S. Ct. 1253 (1995); *Joiner v. General Electric Co.*, 78 F.3d 524, 529 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997) (Federal Rules of Evidence display preference for admissibility).

II. THIS CASE WOULD HAVE BEEN DECIDED DIFFERENTLY IN ANY OTHER JURISDICTION

In comparing decisions in Circuits applying any of the standards of review, this case would have been decided differently under any of the standards in any Circuit other than the Seventh.

The First Circuit: Petitioner submits that had this case been presented to the First Circuit Court of appeals, that Court would have reversed the summary judgment entered for respondent. *See Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184 (1st Cir. 1997). While acknowledging that the "*Daubert* regime can play a role during the summary judgment phase of civil litigation," the First Circuit did not believe "that it should be used profligately." *Cortes-Irizarry*, 111 F. 3d at 188. Rather,

> A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. Voir Dire is an extremely helpful device in evaluating proffered expert testimony. *Cortes-Irizarry*, 111 F.3d at 188, *citing United States v. Sepulveda*, 15 F.3d 1161, 1184 n.15 (1st Cir. 1993).

"This device is not readily available in the course of summary judgment proceedings." *Cortes-Irizarry*, 111 F.3d at 188.

> Moreover, given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. *Id.* at 188.

Finding that the summary judgment process did not conform well "to the discipline that *Daubert* imposes," the First Circuit cautioned that:

> . . . the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage. *Id.* at 188.

In the First Circuit, District Courts are "not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility." *Id.* at 188. And if District Courts should be slow to employ *Daubert* at the summary judgment stage:

> . . . appellate courts should be even more hesitant to head in that direction where there has been no development of the issue below. *Id.* at 189.

See also Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472, 476 (1st Cir. 1997) (after extensive voir dire court held expert testimony inadmissible).

The Second Circuit: Under the analysis set forth in *Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), the Second Circuit would also have reversed summary judgment for respondent. In *Goodrich*, the District Court excluded expert testimony and entered summary judgment for certain defendants. The Second Circuit reversed, finding that the District Court had "assessed the weight of conflicting proof" and "substitut[ed] its judgment for that of the jury." *Id.* at 525.

As in the case before this Court, there was only one expert opinion in *Goodrich* "and the court was obliged not to ignore it." *Id.* As the expert had reviewed nine studies pertaining to the subject landfills, his affidavit was laid on a proper foundation. *Id.*

Finding it admissible, the Second Circuit reasoned that an expert's testimony "need not detail all the facts and data underlying his opinion in order to present that opinion." *Id.* Nor was the expert's affidavit "'junk science' of the sort that should be rejected under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Id.* According to the Second Circuit, if defendants believed that the expert's scientific evidence was weak "they should cross-examine him vigorously at trial and present contrary evidence to refute his findings and conclusions." *Id.*

The Third Circuit: *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 115 S. Ct. 1253 (1995).

Only after an in limine hearing did the district court exclude expert testimony and grant summary judgment for defendant. *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1043, 1055 (3d Cir. 1997) (excluded expert did not qualify as such).

The Fourth Circuit: In *Goewey v. United States*, 106 F.3d 390 (4th Cir. 1997), summary judgment was entered after the experts had testified and the Court of Appeals, having reviewed the testimony, affirmed.

The Fifth Circuit: Vigorous cross-examination is the appropriate means to attack shaky but admissible evidence. *Guillory v. Domtar*, 95 F.3d 1320, 1330 (5th Cir. 1996); *See also Daubert*, 509 U.S. at 596.

The Eighth Circuit: District Courts will screen whether expert testimony satisfies *Daubert* principles by conducting a hearing. *See Wood v. Minnesota Mining and Mfg. Co.*, 112 F.3d 306 (8th Cir. 1997) (lengthy hearing conducted before district court ruled on admissibility).

The Ninth Circuit: District Courts in the Ninth Circuit are also hesitant to exclude expert testimony and will afford a meaningful opportunity to the proponent to defend the admissibility. In *Claar v. Burlington Northern R. Co.*, 29 F.3d 499 (9th Cir. 1994), the district court invited plaintiffs to submit affidavits of their experts. When plaintiffs did so, the court articulated the deficiencies in the affidavits and afforded plaintiffs multiple opportunities to submit amended ones. The district court "repeatedly ordered the experts to explain the reasoning and methods underlying their conclusions. Despite those orders, the affidavits [were] devoid of any such explanation." *Claar*, 29 F.3d at 502.

Only after plaintiffs failed to submit affidavits which answered the deficiencies iterated by the court did the district court grant summary judgment to defendant, which the Ninth Circuit affirmed. *See also Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 596 (9th Cir. 1996) (district court held *in limine* hearing pursuant to F.R.E. 104(a) to determine admissibility).

The Eleventh Circuit: In *Joiner v. General Electric Co.*, 78 F.3d 524, 529 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997), the district court had before it depositions of the experts prior to ruling on the admissibility of their testimony.

The District of Columbia reversed a case similar to the one at bar, finding that summary judgment was premature where the District Court "had not conducted a sufficient inquiry into the bases of the [plaintiffs] experts' opinions." *Ambrosini v. Labarraque*, 966 F.2d 1464, 1469 (Fed. Cir. 1992).

On remand, the District Court issued orders to show cause requiring plaintiffs' experts to produce the articles and other data which formed the basis of their opinions and held an evidentiary hearing. *Ambrosini v. Labarraque*, 101 F.3d 129, 132 (Fed. Cir. 1996). The District Court thereafter found the expert testimony inadmissible and granted summary judgment to defendants. *Id.* In reversing, the Federal Circuit held that:

> . . . the *Daubert* analysis does not establish a heightened threshold for the admission of expert evidence, but rather focuses on the court's 'gatekeeper' role as a check on 'subjective belief' and 'unsupported speculation.' *Id.* at 134.

III. THE DECISION CONFLICTS WITH DECISIONS OF THIS COURT

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court found that the lower courts had taken too restrictive a view in excluding expert testimony. *Id.* at 589 (the "austere standard" under *Frye* should not be applied in federal trials). *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. *Id.* at 589. This standard was too "rigid" and:

> . . . at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' *Id.* at 589 (citations omitted).

The Seventh Circuit, however, has interpreted *Daubert* as imposing a "higher standard for the admissibility of expert-witness testimony." *Rizzo v. Corning Incorporated*, 105 F.3d 338, 340 (7th Cir. 1997). The Seventh Circuit's "higher standard" conflicts with this Court's decision in *Daubert* and the holdings of all other Courts of Appeal.

IV. THE ISSUE IS IMPORTANT

The appropriate standard of review under *Daubert* remains unresolved. While the standard may be answered in *Joiner v. General Electric Co.*, 78 F.3d 524 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997), the Seventh Circuit stands as a maverick among all of the other Court of Appeals irrespective of the standard of review. The Seventh Circuit interprets *Daubert* as requiring a higher standard for admissibility of expert testimony and it permits District Courts to make this assessment without deposition, voir dire or in limine hearing.

CONCLUSION

For the reasons stated, certiorari should be granted. In the alternative, the Seventh Circuit Court of Appeals should be reversed and this case remanded for a decision consistent with this Supreme Court's opinion in *Joiner v. General Electric Co.*, 78 F.3d 524 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997).

Respectfully submitted,

SHELDON A. BRENNER
JANE E. REAMES
BRENNER & MOLTZEN, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
(312) 781-1970
Attorneys for Petitioner
Maria Navarro

APPENDIX A - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JUNE 27, 1997

In the

United States Court of Appeals

For the Seventh Circuit

No. 96-3176

MARIA NAVARRO,

Plaintiff-Appellant,

v.

FUJI HEAVY INDUSTRIES, LTD.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 3203—**Charles R. Norgle, Sr.**, *Judge.*

ARGUED APRIL 7, 1997—DECIDED JUNE 27, 1997

Before POSNER, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges.*

POSNER, *Chief Judge.* Maria Navarro, the plaintiff in a diversity personal-injury suit which the parties agree is governed by the law of Illinois, was a passenger in a 1982 Subaru that had been manufactured in Japan in 1981 by Fuji Heavy Industries, the defendant. The driver lost control of the car when its rear suspension gave way suddenly and unexpectedly as a result of having rusted through. Navarro was flung from the car, which rolled over several times and came to rest on top of her. The accident occurred in 1992 in Chicago, where the car, which had 125,000 miles on its odometer, had mainly been driven. Her claim of

strict products liability was barred by Illinois' 10-year statute of repose for such suits, 735 ILCS 5/13-213(b), so Navarro proceeded on the basis of a claim of negligence that Fuji concedes is not barred by the statute of repose. The claim is that Fuji was negligent in designing the car's rear suspension in such a way that it might rust through if the car was driven in an area in which the roads are heavily salted during the winter—as is the case in Chicago—and, moreover, rust through *from the inside out* (the suspension not being completely sealed against the elements) so that there would be no visual clue that the suspension was about to give way. Two years before the accident, Fuji had acknowledged the problem in a notice of recall that the owner-driver of the Subaru in which Navarro was injured had not seen. Fuji does not argue that the sending of the recall notice to known owners of its cars insulates it from liability, and, conversely, Navarro does not argue that Fuji breached a duty to warn owners of the defect once Fuji discovered it. After the case was removed from the Illinois state court in which it had been filed originally, the district judge granted summary judgment for Fuji on the ground that Navarro had failed to present sufficient evidence of defective design to create a triable issue, and he dismissed the suit. 925 F. Supp. 1323 (N.D. Ill. 1996). Later he dismissed the plaintiff's motion for reconsideration as well.

As we said, this suit is based on negligence rather than on strict products liability. But there is little or no practical difference in a case of defective design, at least so far as the standard of liability is concerned (we have just seen that there is a big difference with respect to the deadline for bringing suit): you must prove that the design was defective in either kind of case, and whether the design was defective is determined by use of the same Hand-formula or cost-benefit approach that is used to determine negligence in a tort case not involving a product. E.g., *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 317 (7th Cir. 1996); *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 902 (7th Cir. 1994); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 467 (7th Cir. 1984). It

is true that cases in Illinois and elsewhere often say that in a strict liability products case the manufacturer's negligence is irrelevant. E.g., *Simpson v. General Motors Corp.*, 455 N.E.2d 137, 141 (Ill. App. 1983), aff'd, 483 N.E.2d 1 (Ill. 1985). But the significance of such language is in curtailing the defense of contributory negligence in products cases and in preventing the manufacturer from defending such a case on the ground that the negligence in the design was due to carelessness by the manufacturer of a component. *Id.* at 141; *Flaminio v. Honda Motor Co.*, *supra*, 733 F.2d at 467. The points are related: the manufacturer cannot defend such a case by pointing to someone else's negligence, whether the victim's or a supplier's. It is also true that the cases frequently offer the plaintiff a choice between proving that the design was defective and proving that it was not as safe as the consumer would reasonably have expected. E.g., *Lamkin v. Towner*, 563 N.E.2d 449, 457 (Ill. 1990). But this comes to the same thing; the consumer expects the products he buys not to be defectively designed.

So there is one test, and it is objective, *Flaminio v. Honda Motor Co.*, *supra*, 733 F.2d at 467; it is based on what Fuji should have done about rust in light of what it should have known, not what it should have done in light of what it *did* know. The fact that as a Japanese firm it may not have known much about Chicago driving conditions is irrelevant (as well as highly improbable, since it has and had an elaborate distribution and dealership network throughout the United States, including the Chicago area). Fuji intended to sell its cars in the Chicago area and is therefore charged with whatever knowledge can reasonably be imputed to automobile manufacturers, wherever located, desiring to serve that market. W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 32, pp. 184 (5th ed. 1984).

And while we are clearing away the underbrush of this suit we point out that there is no merit to Fuji's argument, which it puts forward as an alternative ground for upholding the district court's judgment, that the Subaru

"just wore out," so that the accident was not caused by the defect in the suspension. It is true that cars become inoperable for a variety of reasons many of which are not attributable to the manufacturer, including driver abuse and neglect, poor maintenance by dealers and auto repair shops, defective replacement parts, collisions, metal fatigue, and corrosion. Fuji did not warrant that its 1982 Subarus would still be operable after ten years and 125,000 miles of driving on Chicago's roads—but neither did it warn buyers that it was unsafe to drive a car with such a history because it might veer out of the driver's control without warning. Nor did the car fall apart because of the mechanical equivalent of old age (the one-horse-shay phenomenon) or the actions or inactions of the driver, the dealer, or anyone else—besides the designers of the rear suspension system. Had they designed it differently, the car would not have given out as soon as it did (at least without warning from visible rust) and Navarro would not have been injured. Fuji does not argue that the car was otherwise in so dangerous a condition through no fault of Fuji's that Navarro's damages should be cut down to reflect the likelihood that she would soon have been injured by some other disastrous failure of the car's aging components. *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 822-23 (7th Cir. 1985); *Stoleson v. United States*, 708 F.2d 1217, 1223-24 (7th Cir. 1983); *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173-74 (2d Cir. 1970) (Friendly, J.); cf. *Doll v. Brown*, 75 F.3d 1200, 1205-06 (7th Cir. 1996). On this record we must assume that the design of the rear suspension was a cause of the accident, and a culpable cause if the design was defective.

To show that it was defective—that is, that due care required Fuji to design the rear suspension in such a way that it either would not rust even if driven for many years in Chicago or, more plausibly, that if it did rust the rust would show so that the suspension could be replaced before it gave way—the plaintiff presented the affidavit of a qualified engineer, the recall notice, a corrosion report by a trade association, and an affidavit by another expert

that the judge properly ruled inadmissible because unverified and that in any event added nothing material to the first expert's affidavit. The affidavit of the first expert was the centerpiece of Navarro's case and the judge found that it was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See also *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 537 (7th Cir. 1997); *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997); *Cummins v. Lyle Industries*, 93 F.3d 362, 367-69 (7th Cir. 1996); *Rosen v. Ciba-Geigy Corp.*, *supra*, 78 F.3d at 318-19.

It is noteworthy that the affidavit and the plaintiff's other evidentiary materials were not presented in response to affidavits or other evidence in support of the defendant's motion for summary judgment. The defendant did not present *any* evidence in support of its motion. It was not required to. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Fitzpatrick v. Catholic Bishop*, 916 F.2d 1254, 1256 (7th Cir. 1990). It could put the plaintiff to her proof, though in doing so it was taking the risk that the plaintiff might try to establish her prima facie case not by presenting evidence but by invoking the doctrine of *res ipsa loquitur*, which in Illinois goes by the name of the *Tweedy* doctrine when it is invoked in a products liability case. *Tweedy v. Wright Ford Sales, Inc.*, 357 N.E.2d 449, 452 (Ill. 1976); see *Rizzo v. Corning Inc.*, 105 F.3d 338, 340 (7th Cir. 1997); *Welge v. Planters Lifesavers Co.*, 17 F.3d 209, 211 (7th Cir. 1994). The plaintiff might have argued that you don't need expert evidence to show that it is negligent to design a rear suspension system in such a way that if it rusts, the rust will be invisible until the system suddenly collapses. We don't say that such an argument would fly (probably it would not, as will become clearer), but only that it wasn't attempted; the plaintiff has tacitly conceded that in order to withstand summary judgment she had to present evidence that Fuji was negligent in designing the suspension system as it did.

The district judge was only half right in finding that the expert's affidavit flunked the *Daubert* test. The ex-

pert is an experienced consultant in the relevant fields of failure analysis, mechanical safety, and accident reconstruction; he inspected the ruined car; and he explained lucidly how the accident had come about—through the insidious corrosion of the rear suspension. So far, so good; there was no basis for excluding this part of the affidavit. *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100-01 (10th Cir. 1991). The problem is that the expert didn't stop there. First, he observed correctly but inconsequently that Fuji was aware of the special corrosion problem in Chicago. So far as appears the expert was here merely paraphrasing the recall notice. The notice was issued in 1990, and without more does not show that Fuji or any other automobile manufacturer knew or should have known about the problem in 1981, when the car was manufactured, or 1982, when it was sold. (The same problem afflicts evidence Navarro tried to present of identical accidents that occurred after 1982.) No doubt American manufacturers, at least—and remember that Fuji cannot plead excusable ignorance on the basis of its being a foreign company—knew that road conditions in Chicago are more corrosive than elsewhere, but it cannot be assumed that they knew they should be worrying about the corrosion's starting inside the suspension.

A more fundamental point is that knowledge of a hazard does not equate to negligence for failing to take a particular precaution against it. Negligence depends on the magnitude and likelihood of the hazard and on the cost of preventing the hazard or reducing its likelihood. E.g., *Yager v. Illinois Bell Tel. Co.*, 667 N.E.2d 1088, 1092 (Ill. App. 1996); *Hendricks v. Peabody Coal Co.*, 253 N.E.2d 56, 61 (Ill. App. 1969); *Bammerlin v. Navistar International Transportation Corp.*, *supra*, 30 F.3d at 902; *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557 (7th Cir. 1987). Remember too that the specific hazard at issue in this case is not the rusting of the suspension per se but its rusting in a manner that would supply no visual clue until too late; and there is no indication in the affidavit that Fuji or anyone else knew or should have known of *this* hazard in 1981.

The affidavit goes on to state that "prior to 1981, Fuji Heavy Industries knew of the corrosive effects of road salt on the suspension arms of a vehicle"—but this amounts to nothing more than the truism that a manufacturer of a steel product is charged with elementary knowledge that salt is corrosive. With little more ado the expert concluded that "the design and manufacture of the rear suspension arm in 1981 was negligent and unreasonable." The affidavit contains no support for this conclusion, and a conclusion without any support is not one based on expert knowledge and entitled to the dignity of evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*, 509 U.S at 590; *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344-45 (7th Cir. 1995); *Bammerlin v. Navistar International Transportation Corp.*, *supra*, 30 F.3d at 901. Thus at most the affidavit is evidence that Fuji should have known back in 1981 that its rear suspension might rust through in highly corrosive driving environments. There is no indication that responsible engineers at the time thought the hazard considerable because undetectable, and therefore worth guarding against and if so by what means, or that Fuji could have redesigned the suspension to avoid the hazard at a cost commensurate with the expected accident cost, which might reasonably have seemed slight—or indeed at any cost. The affidavit is silent on what other automobile manufacturers were doing about corrosion in 1981. All that one can draw out of the affidavit is that the accident was indeed caused by the undetectable rusting of the rear suspension and that Fuji knew that the suspension might rust—but not that it might do so undetectably—if driven on heavily salted roads.

The plaintiff argues that the gaps in the expert's affidavit would have been filled if only the defendant, before moving for summary judgment, had deposed the expert. But there is no duty to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit. An expert's affidavit must be sufficiently

complete to satisfy the criteria of the *Daubert* decision, and one of those criteria, as we have been at pains to emphasize, is that the expert show how his conclusion, in this case that Fuji should in the exercise of due care have designed the 1982 Subaru's rear suspension differently, is grounded in—follows from—an expert study of the problem.

The recall notice adds nothing to the affidavit. It merely shows that in 1990 (for there is no indication that Fuji discovered the problem earlier and sat on it) Fuji discovered the problem of the undetectable rusting. The only other admissible document on which the plaintiff relied in opposing summary judgment is an undated report of the American Iron and Steel Institute on corrosion. (Internal evidence suggests that the report was written in the early years of this decade.) The report points out that because of the high cost of electricity in Japan, Japanese auto manufacturers use lighter alloys to rustproof their cars than American manufacturers do but that in view of the corrosive conditions on many American roads the Japanese manufacturers are moving toward heavier alloys. This is some evidence that in the early 1980s Japanese cars were not as resistant to rust as American cars were, but it is not, without more—and there is no more—evidence that the difference created an incremental hazard great enough to make the Japanese cars defective.

When the inadmissible, because nakedly conclusional, portions of the expert's affidavit are stricken, there just is no evidence, though there may be a common-sense suspicion, that the 1982 Subaru's rear suspension was defective. The district judge was therefore right to grant summary judgment for Fuji. The plaintiff, however, moved for reconsideration under Fed. R. Civ. P. 59(e) and attached a new, amended affidavit of its expert, plus some answers to interrogatories summarizing additional expert testimony, interrogatories that the plaintiff had made a part of the record before the suit had been removed to federal court but had failed to bring to the district judge's

attention—wisely so. For the most arresting answer is an acknowledgment that not until 1985, four years after the manufacture of the fatal vehicle, had Chicago been classified as having severely corrosive road conditions. That was in the AISI report that we mentioned; there is no indication that anyone else does these classifications.

The amended report comes a little closer to adequacy, mainly by citing engineering literature from the 1970s that, according to the affidavit, shows that the corrosion problem in Chicago was well known then and that there were accepted methods of avoiding the hazard that caused the 1982 Subaru to fall apart when it did. The literature is not appended to the affidavit or explained in it; it is merely cited; but we won't quibble, and will assume for the sake of argument that had it been placed in evidence before the judge ruled on the defendant's motion for summary judgment he would have had to deny the motion. The insuperable difficulty for the plaintiff is that a motion to alter the judgment may not be based on evidence that was available when the district judge took the motion for summary judgment under advisement but that was not presented then. *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 867 (7th Cir. 1996); *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996). If the plaintiff needed more time to obtain a decent affidavit, she could have asked the district judge for more time, Fed. R. Civ. P. 56(f); *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 326, and she did not. He had no reason to believe that she was holding evidence back, and no obligation to give her two bites at the apple. If district judges were required to consider evidence newly presented but not newly discovered after judgment, there would be two rounds of evidence in a great many cases. Even in this court, the plaintiff has offered no reason for her failure to submit a better affidavit on the first round—except that she expected the defendant to give the expert a chance to plug the holes in his testimony by deposing him.

AFFIRMED.

10 No. 96-3176

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—6-27-97

APPENDIX B - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED APRIL 22, 1996

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 93 C 3203

MARIA NAVARRO,

Plaintiff,

v.

FUJI HEAVY INDUSTRIES, LTD.,

Defendant.

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is the motion of Defendant Fuji Heavy Industries, Ltd. ("Fuji") for summary judgment on Count IV, the sole remaining count of Plaintiff Maria Navarro's ("Navarro") Complaint. For the following reasons, the motion is granted.

I. Background

Navarro sustained injuries as a passenger in a 1982 Subaru automobile ("car") which was involved in a single-

vehicle accident in July 1992. In Count IV, she seeks recovery from Fuji under a theory of negligent product design of the car. Fuji manufactured the car in August 1981. Navarro claims that Fuji negligently designed or manufactured the car's suspension components, in that they were insufficiently corrosion-resistant, thus causing the accident eleven years later.

Robert Johnston ("Johnston") owned the car and was driving it at the time of the accident. Navarro sat in the front passenger seat of the car, with two children in the back seat. It was cloudy on the day of the accident and had rained the previous day. As to the condition of the roadway pavement, Johnston stated that the state trooper lied when the trooper said in the accident report that the pavement was wet.

Johnston claims that the accident occurred when the car left the road and flipped-over when travelling 40-45 miles per hour near the bottom of a highway entrance ramp. As Johnston drove on the descending, curved ramp, he felt the rear end of the car slide to the edge of the ramp. Although he tried to correct the movement, the passenger-side wheels slid onto the shoulder and into the gravel. When Johnston tried to return the wheels to the road, "the thing flipped." As this occurred, there is no evidence of a speed change. The car flipped two times and landed on all four tires on the side of a hill, with the passenger-side tires lower than the driver-side tires. Navarro ended up under the car after the accident. Johnston, who remained in the car, attempted to turn the wheel while passers-by attempted to push the car off of Navarro. Johnston neither heard nor observed anything unusual prior to the accident.

On the day of the accident, the car's odometer read 124,671 miles. Johnston had driven the car about 35,000 miles after obtaining it with approximately 89,000 miles.[1] The trunk of the car held cans of oil, car parts, a spare tire and jack, rags, funnels, and painting equipment.

It appears that Johnston was the car's fourth owner. Emily Moore of Greenville, Illinois, purchased the car new in June 1982. In December 1987, a subsequent owner (Judy Johnson of Villa Park, Illinois) sold the car to Eric Lange of Oak Park, Illinois. Johnston obtained the car in May 1989 from Eric Lange, in exchange for painting Lange's hallway. The car had not been used for a long period of time before Johnston started driving it. Johnston, an apprentice painter, traded painting work which he valued at approximately $550 for the car. At the time of trade, the car was in need of repairs: because of an earlier accident, the car had a bent fender, door, and hood; and the rubber bumper guards were also missing. In May 1989, Johnston replaced the brakes, shock absorbers, fender, hood, clutch, ground cable and ignition switch. Johnston personally helped a mechanic replace the two rear shock absorbers. Replacement of the shock absorbers was the only work performed on the suspension system. There is nothing in the record about maintenance except Johnston's statements.

Johnston never brought the car to a Subaru dealership. He experienced no problems with the car before the accident. Fuji issued a recall notice on the car's suspension system because of suspension system corrosion

---

[1] Johnston recorded the odometer mileage on title documents at 73,000, however.

problems in 1990. Johnston says he did not receive the notice.

II. Discussion

To defeat a motion for summary judgment, the non-movant must marshal evidentiary facts sufficient to raise a genuine issue of material fact. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 317, 324 (1986). Summary judgment shall be rendered where the pleadings, depositions, and admissions of record, together with any affidavits, demonstrate there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Under Rule 56(c), summary judgment is appropriate where a party has failed to establish an essential element of its case for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Fuji asserts that it is entitled to summary judgment because Navarro cannot establish two essential elements of a prima facie negligent product design case. First, Fuji asserts that Navarro cannot demonstrate that her 1992 injuries resulted from a defective and unreasonably dangerous condition of the car which existed when it left Fuji's control in 1981. Second, Fuji states that Navarro cannot demonstrate that Fuji deviated from the applicable standard of care when it designed and manufactured the car.

Navarro has pleaded a theory of negligence rather than strict liability. Though, as here, where a plaintiff alleges a "defect in design rather than manufacture, there may be no difference." Rosen v. Ciba-Geigy Corp., No. 95-3064, (7th Cir. Mar. 11, 1996) (citing Bammerlin v. Navistar Int'l

Transp. Corp., 30 F.3d 898, 902 (7th Cir. 1994); Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 467 (7th Cir. 1984)). In both strict liability and negligent design actions, plaintiffs must demonstrate that the product was defective when it left manufacturer's control. Carrizales v. Rheen Mfg. Co., Inc., 226 Ill. App. 3d 20, 35 (1st Dist. 1991). The threshold question for determining a defect is whether the product is dangerous because it fails to perform as reasonably expected considering its nature and intended function. Baltus v. Weaver Div. of Kidde & Co., Inc., 199 Ill. App. 3d 821, 830 (1st Dist. 1990).

Furthermore, plaintiffs in negligent design cases must show that the defect was the proximate cause of the injury. Korando v. Uniroyal Goodrich Tire Co., 159 Ill. 2d 335, 344 (1994). Manufacturers will not be held liable for injuries which occur when a product simply wears out. See id. (holding that a tire manufacturer was not liable for injury allegedly caused by severely worn tires); Glass v. Allis-Chalmers Corp., 789 F.2d 612, 614 (8th Cir. 1986) (citation omitted).

To prevail against a product manufacturer under a negligent design theory, plaintiffs must also show that the manufacturer had a duty to design something safer. Carrizales, 226 Ill. App. 3d at 35. The duty to manufacture "reasonably" safe products demands neither the safest design possible nor a design incapable of causing injury. Baltus v. Weaver Div. of Kidde & Co., Inc., 199 Ill. App. 3d 821, 829 (1st Dist. 1990).

At a minimum, Navarro must be able to establish a prima facie case in order to withstand a motion for summary judgment. Guilty v. Village of Oak Park, 919 F.2d 1247,

1250 (7th Cir. 1990) (quoting Morgan v. Harris Trust & Savings Bank, 867 F.2d 1023, 1027-28 (7th Cir. 1989). Navarro must show that the car was defective when it left Fuji's control, that the defect caused her injuries, and that Fuji had a duty to design something safer. She has not done so.

When determining whether a plaintiff has established a prima facie case which withstands summary judgment, courts may consider only evidence which would be admissible at trial under the Federal Rules of Civil Procedure. Whitted v. General Motors Corp., 58 F.3d 1200, 1204 (7th Cir. 1995). In response to Fuji's motion, Navarro points to the following: Fuji's recall notice regarding the suspension system; an unverified report by Maurice Howes ("Howes"), a "metallurgical consultant"; an affidavit by Crispin Hales ("Hales"), an engineering expert; and a 1991 report by the American Iron and Steel Institute entitled Cracking Down on Corrosion ("AISI Report"). The court will discuss each of these documents separately.

First, although Fuji argues that the recall notice is irrelevant and should be excluded under Federal Rules of Evidence 401 and 402, the court finds that the notice would be admissible. However, it could only be used for the limited purpose of establishing that the car's suspension system was defective; created nine years after the car's manufacture, the notice would not be admissible to show that Fuji knew or should have known about the defect, or that it failed to use a reasonable standard of care at the time relevant to this lawsuit, the 1981 date of manufacture. See Carrizales, 226 Ill. App. 3d at 39 (stating that evidence of subsequent remedial measures may not be admissible as proof of

negligence, though it may be introduced as to feasibility of design).

Second, the court finds that the Howes report would not be admissible at trial. The Howes report is unverified and fails to meet the admissibility requirements of Federal Rule of Civil Procedure 56. Rule 56(e) demands that a party opposing summary judgment respond "by affidavit or as otherwise provided in this rule." Fed. R. Civ. P. 56(e). Courts may consider documents not specified in the rule only if an attached affidavit meeting the requirements of Rule 56(e) authenticates the documents. Oriental Health Spa v. City of Fort Wayne, 864 F.2d. 486, 491 (7th Cir. 1988) (determining that courts may consider an edited videotape only if it is properly authenticated and otherwise reliable). Unsworn, the Howes report is not an affidavit, nor does it qualify as one of the materials enumerated in Rule 56(c), nor is it attached to or authenticated by an affidavit. Accordingly, the court must strike the Howes report.

Even if the Howes report were admissible, it would only establish that the system was defective, a fact not disputed by Fuji. The critical portion of the Howes report states:

> [The car] was operated in the Chicago area, which is located in what is sometimes referred to as the "salt belt[.]" This area was classified as having a severe corrosive environment . . . [in the AISI Report] . . . . Vehicle[s] operated under these conditions must be designed to resist corrosions and be suitably protected. Examination of many vehicles by the writer suggests that the designers of early imported vehicles were not fully cognizant of conditions in this area of the United

> States which probably has the most corrosive road conditions in the World far beyond those experienced in most other countries. . . . When the thinned metal . . . finally parted under stress, such as might be caused by cornering, the only thing holding the wheel to the car was the reinforcing plate . . . , thus allowing the wheel to move suddenly . . . thus making the car very difficult to control.

(Howes report at 1-2) (emphasis original). The report does not have any bearing on whether Fuji knew or should have known about the defect, whether the defect caused Navarro's injury, or whether Fuji failed to use a reasonable standard of care. The Howes report indicates that the suspension system suffered from a general thinning of the steel and from crevice corrosion due to the absence of the original corrosion protection system. Moreover, the report does not indicate that Fuji knew, or should have known, about the conditions in the "salt belt" in 1981, and does not indicate that Fuji failed to exercise reasonable care. Furthermore, the Howes report states only that the failure of the suspension system might have occurred "while cornering," not that the failure caused Navarro's accident. In discussing what might have occurred, Hales does not address the suspension system's potential for failure as the car landed in an upright position on all four wheels. Accordingly, even if the court were to find the Howes report admissible, at best, it could show only that the suspension system was defective.

Third, the Hales affidavit would be inadmissible as well. Fuji contends that the affidavit is inadmissible under Federal Rule of Evidence 702.[2] Under Rule 702, "The

---

[2] Rule 702 states:

subject of an expert's testimony must be 'scientific . . . knowledge.'" Daubert v. Merrell Dow Pharms., Inc., 113 S. Ct. 2786, 2795 (1993) (footnote omitted), on remand 43 F.3d 1311 (9th Cir. 1995). The term "scientific" indicates that the conclusions in expert reports must be based on scientific methods and procedures, rather than subjective belief and unsupported speculation. Id. See also Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341 (7th Cir. 1995). When analyzing expert reports, courts should consider the following: whether theories or techniques can and have been tested, whether it is generally accepted by the scientific community, whether it has been the subject of publication and peer review, and whether it has an acceptable known or potential error rate. Daubert, 43 F.3d at 1316. "The focus, of course, must be solely on principles and methodology, not on the conclusions they generate." Daubert, 113 S. Ct. at 2797. Experts cannot float their conclusions on cushions of air; they must rest those conclusions upon foundations built from reliable scientific explanation.[3] Hales has not done so to Navarro's peril.

If scientific, technical or other specialized knowledge will assist the trier of the fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of opinion or otherwise.

[3] The court notes that, although Federal Rule of Evidence 705 permits experts at trial to present naked opinions, for purposes of an affidavit at summary judgment, an expert must present only conclusions shown to arise out a reasoning process based on a firm foundation. See Resolution Trust Corp., v. O'Bear, Overholser, Smith & Huffer, 886 F. supp. 658 (D.Ind. 1995).

The Hales affidavit sets forth no reliable foundation for its conclusions. Hales generally states that his opinions are based on "education; training; experience; knowledge of the literature; inspection of the subject vehicle . . . and the accident site . . . ; photographs of the subject vehicle and accident site; police report; records provided by Subaru of America; the deposition transcript of Robert Johnston; and, the August 26, 1992 report of Dr. Maurice Howes." [4] (Hales Aff. at 1.) He makes no mention of specific Subaru records or testing methods. Immediately thereafter, Hales concludes, "Based upon the foregoing, it is my opinion . . . that the proximate cause of the loss of control and rollover accident . . . was the structural failure of the rear left suspension arm on . . . [the car]." (Hales Aff. at 1-2.) Further, Hales professes that Fuji knew of the defect in the suspension arm because it issued the 1990 recall notice but does not even attempt to show a basis for any such knowledge. In addition, like Howes, Hales states that the failure of the suspension arm resulted from progressive corrosion, an undisputed fact. Unlike Howes, however, Hales affirmatively states that the corrosion caused the failure of the suspension arm and the loss of control of the car; again, Hales does not explain how he knows this. Next, Hales states that Fuji was aware that users of the car could not detect the corrosion. Hales does not mention whether corrosion or problems with the suspension arm would be detectable during dealer-performed

---

[4] The court recognizes that Hales my rely on otherwise inadmissable and unsworn material in forming his conclusions, such as the Howes report. See Gong v. Hirsh, (7th Cir. 1990) (stating that, although the trustworthiness of the underlying data is relevant, an expert may rely on otherwise inadmissible reports, provided that they are of the sort reasonably relied upon by experts).

or other professionally-performed routine or scheduled maintenance. Nothing in the record suggests that Fuji professed to manufacture and sell a maintenance-free car. Hales says that Fuji was aware of the likelihood of iniury resultinq from a crash after failure of an inadequate suspension arm. Hales intuits that Fuji was aware of the levels of road salt and corrosion to which cars operating in the "Rust Belt" were exposed. Next, Hales proclaims that Fuji knew of the corrosive effects of road salt on automobile suspension arms and that its corrosion prevention system was inadequate to withstand Chicago conditions.

Moreover, Hales continues, "During the course of their design and manufacture of . . . [the car] . . ., Fuji . . . failed to apply the knowledge and skill that was ordinarily used by reasonably well qualified engineers." (Hales Aff. at 3.) Hales makes no attempt to explain what that knowledge or skill would have been. Further, Hales concludes that the accident would not have occurred but for the failure of the suspensions system. He does not discuss situational factors present at the accident such as road conditions, speed, cargo, curve, or decline of the ramp. Finally, Hales' blazons his ultimate conclusion: "[T]he design and manufacture of the rear suspension arm in 1981 was negligent and unreasonable." (Hales Aff. at 3.) Hales does not profess to be an accident reconstruction expert or that he did an accident reconstruction analysis.

Hales has not provided adequate scientific support for these damning conclusions. He cites no published journals, studies, reports, or treatises, nor has he set forth the methodology employed in reaching his conclusions. He does not identify testing or research techniques. There is no reference to peer review of any results reached by Hales.

Hales' general description of various documents and litigation-related inspection activity do not satisfy even a liberal reading of the Daubert requirements.

However, Hales' statement that failure of the suspension arm caused the accident does not run contrary to Fuji's position and does not materially advance the litigation: Fuji denies not that the system failed, but rather that it was negligent in designing a system that failed after eleven years and 124,000 miles in the "Rust Belt." Moreover, Hales does not attempt to outline the basis for his various conclusions about the state of Fuji's "awareness." Furthermore, Hales includes nothing defining the "reasonable standard of care" in the industry, much less any information showing that Fuji failed to conform to such a standard. He refers to no specific applicable standard. "'An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process. . . . [W]hy should a court rely on the sort of exposition. . . [a] . . . scholar would not tolerate in his professional life?'" Rosen v. Ciba-Geigy Corp., No. 95-3064, 1996 WL 106362, at *3 (7th Cir. Mar. 11, 1996) (quoting Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989). Hales' failure to meet Daubert requirements renders inadmissible Hales' affidavit, particularly the portions regarding causation, Fuji's awareness, and the applicable amorphous standard of care.

Fourth, Navarro attaches the AISI report to its submissions. Neither party disputes the accuracy of the information contained in that report. Evidence of standards promulgated by industry, trade, regulatory groups or agencies may be admissible to aid trier of fact in determining the applicable standard of care in negligence actions. Carrizales v. Rheen Mfg. Co. Inc., 226 Ill. App. 3d 20, 44

(lst Dist. 1991). However, the AISI report contains little which could aid the trier of fact in proving any contested issue in the instant case. The report does state that Japanese automobile manufacturers upgraded their products' corrosion protection between 1980 and 1990 to meet the requirements of North American road conditions. Implicit in the report is the concept that corrosion is a problem for automobile manufacturers, both foreign and domestic. The AISI report also states that "major strides" have been made in the development of cost-effective corrosion protection systems since 1981. However, these statements do not indicate that any Japanese manufacturer, like Fuji, was negligent in the design of their earlier corrosion protection systems. The AISI report does not discuss what car manufacturers should have reasonably done to protect their products from corrosion, or even what they were capable of doing. In short, the AISI report does not aid Navarro in her search for a prima facie case.

Navarro had the opportunity to establish such a case. For example, she could have introduced evidence comparing other corrosion protection systems used by other manufacturers in 1981 to Fuji's. She could have introduced evidence regarding testing of comparable products. At a minimum, she could have submitted an expert's report which described scientific methods used in analyzing the evidence. She did not. Navarro has offered no evidence demonstrating that the 1981 Subaru failed to perform as reasonably expected considering its nature and intended function, that a defect was the proximate cause of her injuries, or that Fuji had a duty to design something safer. She did not even establish a corrosion prevention standard of care for 1981 automobile manufacturers, much less that Fuji deviated from such a standard or that it knew or should have known of any

unreasonably dangerous condition of the car. As such, Fuji has demonstrated that there material fact and that it is entitled to judgment as a matter of law. See Berry v. Armstrong Rubber Co., 989 F.2d 822, 827 (5th Cir. 1993) (affirming summary judgment where plaintiff's five experts failed to satisfy the requirements of Rule 703); Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565 (N.D. Ill. 1993) (excluding plaintiff's expert's conclusions because expert failed to test his conclusions despite the ready facility to do so.)

In addition, especially in the absence of Navarro's prima facie case, the court considers the argument, raised by Fuji, that the car simply wore out. Fuji was not required to design and manufacture a car that was wholly immune to corrosion. Korando v. Uniroyal Goodrich Tire Co., 159 Ill. 2d 335 (1994). Navarro does not contest Fuji's assertion that Fuji did equip the car with a corrosion prevention system. The car, manufactured in 1981 and sold in 1982, withstood eleven years and 124,000 miles in the most corrosive environment in the world, according to Navarro's own proffered expert. Both of Navarro's experts stated essentially that the car's suspension arm simply deteriorated over time. Even if the court were to accept those experts, neither expert's testimony would show that such wear occurred as a result of Fuji's negligence in 1981. Although "age and worn condition may not be enough by themselves to negate liability, . . . increased longevity must yield a progressively stronger inference that a given product . . . was not defective, but failed from extrinsic causes." Mullen v. General Motors Corp., 32 Ill. App. 3d 122 (lst Dist. 1975) (citation omitted).

Even construing evidence and drawing inferences in favor of Navarro, the court finds that Navarro has failed to establish a prima facie case of negligent design. See Fed. R. Civ. P. 56(c), Wolf v. Buss (America) Inc., 77 F.3d 914, 923 (7th Cir. 1996). Where a plaintiff fails to establish such a case, summary judgment in favor of the defendant is appropriate. Bank of Ill. v. Allied Signal Safety Restraints Systems, 75 F.3d 1162, 1172 (7th Cir. 1996).

III. Conclusion

For the foregoing reasons, the court grants summary judgment in favor of Fuji.

IT IS SO ORDERED.

ENTER:

s/_____
CHARLES RONALD NORGLE, SR. Judge
United States District Court

DATED: 4/ /96

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED AUGUST 20, 1996

ORDER

Before the court is Navarro's Motion to Alter or Amend Judgment. For the following reasons, the motion is denied.

Motions to Alter or Amend Judgment under Rule 59(e) serve a limited function. They are ordinarily used to correct clear errors of law or fact or to present newly-discovered evidence which could not have been adduced during the pendency of the motion. Souter v. International Union, UAWA, 993 F.2d 595, 599 (7th Cir. 1993); Kohl v. Murphy, 767 F. Supp. 895, 904 (N.D. Ill. 1991). They cannot be used to introduce legal theories for the first time, or to raise legal arguments or present evidence that could have been adduced during the pendency of the original motion. Kohl, 767 F. Supp. at 904. Finally, "rehashing" of old arguments is prohibited when presenting such a motion. Refrigeration Sales Co. v. Mitchell-Jackson, Inc., 605 F. Supp. 6,7 (N.D.Ill. 1983).

Essentially, Navarro argues that the court should have considered evidence which she failed to present to the court at summary judgment. The court found that the expert reports submitted by Navarro with her Local Rule 12(N) statement did not meet the requirements of Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). Navarro argues that additional evidence, underlying the conclusory reports was "already a part of the court record" because it was attached to interrogatories in the state court file. The court is under no obligation to scour court records for

inklings of support for plaintiffs' 12(N) statements. See Guzzo v. Northest Ill. Regional R.R. Corp., NO. 94 C 5813, 1996 WL 131730, at *1 (N.D. Ill. Mar 15, 1996) (pupose [*sic*] of rule is to facilitate orderly development of factual record); Kinney v. Dominick's Finer Foods, Inc., 780 F. Supp. 1178, 1782 (N.D. Ill. 1991) (stating that the court would not "pick through" brief [much less the entire record] to find relevant facts). One purpose of Local Rule 12 is to organize evidence in one place for court analysis. Fuji challenged the expert reports at summary judgment, and Navarro had the opportunity to present additional evidence in her 12(N) statement. Further, she could have requested leave to file a surreply in answer to Fuji's reply brief. She did no. "[P]ost-judgment motions cannot be used to raise arguments or legal theories that could have been and should have been brought before judgment." Anderson v. Flexel, Inc., 47 F.3d 243, 247 (7th Cir. 1995). Navarro's failure to bring her evidence to the court's attention, and failure to argue its existence at summary judgment, constitutes waiver.

Navarro states correctly that movants at summary judgment must demonstrate that there is no material issue of fact for trial. She overlooks the corollary requirement, though: to defeat a motion for summary judgment, nonmovants must marshal evidentiary facts sufficient to raise a genuine issue of material fact. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1996). As the court discussed in its order granting summary judgment, Navarro failed to do so, even viewing all evidence presented in the light most favorable to Navarro. As such, her motion for reconsideration is denied.

APPENDIX D — RULES INVOLVED

FEDERAL RULES OF EVIDENCE

Rule 104

Preliminary Questions

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice request, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, becomes subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

* * * *

Rule 702

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703

Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not admissible in evidence.

Rule 704

Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705

Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(2)

No. 97-597

Supreme Court, U.S.
FILED
NOV 4 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARIA NAVARRO, PETITIONER

v.

FUJI HEAVY INDUSTRIES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

JEFFREY SINGER
ROBERT E. O'MALLEY
PAUL E. WOJCICKI
Segal McCambridge Singer & Mahoney Ltd.
Two First National Plaza
20 South Clark Street
Chicago, IL 60603
(312) 782-3800

KENNETH S. GELLER
ALAN E. UNTEREINER*
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

JOSEPH J. KUTER
Senior Counsel
Subaru of America, Inc.
Subaru Plaza
2235 Route 70 West
Cherry Hill, NJ 08034
(609) 488-8572

**Counsel of Record*

16 pp

QUESTION PRESENTED

Whether, in this diversity action based on Illinois law, the court of appeals erred in affirming summary judgment on the ground that the plaintiff failed to submit sufficient admissible evidence to make out a *prima facie* case of negligent design of an automobile's suspension system.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent Fuji Heavy Industries, Inc. (Fuji) states that it has no parent company and its only non-wholly owned subsidiary is Subaru-Isuzu Automobile, Inc., which is 51% owned by Fuji and 49% owned by Isuzu Motors Limited.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 7

CONCLUSION 12

TABLE OF AUTHORITIES

Cases: **Page**

Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 2

Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) . . . . . *passim*

Rules:

Fed. R. Civ. P. 56 2

F.R.E. 104(a) 11

F.R.E. 702 3

S. Ct. Rule 14.1(a) 12

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent Fuji Heavy Industries, Inc. (Fuji), respectfully submits that the petition for certiorari should be denied.

STATEMENT

This diversity action arises out of a rollover accident involving a Subaru automobile that was manufactured in Japan by respondent Fuji in August 1981. At the time of the accident almost eleven years later, in July 1992, the car had been driven approximately 125,000 miles along roads in the Chicago, Illinois area that "are heavily salted during the winter." Pet. App. 2a. The accident occurred when the automobile's "rear suspension gave way suddenly and unexpectedly as a result of having rusted through." *Id.* at 1a. Petitioner Navarro, who suffered injuries when she was thrown from the vehicle during the rollover, sued Fuji for negligence in the design of the rear suspension, alleging that the suspension was not completely sealed from the elements and thus was susceptible to rusting through from the inside out without providing any visual clue of that process — at least if the car were driven long enough on heavily salted roads. The district court granted summary judgment in Fuji's favor, and a unanimous panel of the Seventh Circuit affirmed.

1. Navarro initially brought this action in Illinois state court. In her amended complaint, she alleged five claims on behalf of herself and her two minor children (who were also passengers in the car). Against Fuji she asserted claims for strict products liability and for negligence. She also asserted similar claims against Subaru of America, Inc., the U.S. distributor of the automobile. And she asserted a claim for negligence against Robert Johnston, the owner and driver of the vehicle.

The state court dismissed Navarro's strict liability claim against Subaru of America as barred by Illinois's ten-year statute of repose. It also granted summary judgment in Subaru of America's favor on Navarro's claim for negligence. Navarro settled with Johnston. After Navarro

disclosed in response to interrogatories that she had incurred medical expenses in excess of $85,000 as a result of the accident, Fuji, the sole remaining defendant, removed the case to federal court.

The district court dismissed the minors' claims pursuant to stipulation. It also dismissed Navarro's strict liability claim against Fuji as time-barred. That left only a single claim in the case: Navarro's claim that Fuji negligently designed the Subaru's "suspension components, especially the inner arms," so that they were "susceptible to premature corrosion" and "not adequately rustproofed." R. 1, Ex. 1, count IV, ¶¶ 5-8; Pet. App. 2a, 14a.

2. Fuji moved for summary judgment on Navarro's negligent design count. Fuji argued that Navarro had failed to "establish two essential elements of a *prima facie* negligent design case" under Illinois law: the fact that "her 1992 injuries resulted from a defective and unreasonably dangerous condition of the car which existed when it left Fuji's control in 1981"; and a deviation by Fuji "from the applicable standard of care when it designed and manufactured the car." Pet. App. 14a.

Rather than presenting any evidence of its own in support of its summary judgment motion, Fuji "put the plaintiff to her proof" as permitted under Rule 56 of the Federal Rules of Civil Procedure. Pet. App. 5a (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986)); see generally *Celotex*, 477 U.S. at 322-24 (stating that Rule 56 "mandates the entry of summary judgment * * * against a party who fails to makes a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"; and rejecting the argument that a movant for summary judgment is required to submit affidavits in support of the motion). In an effort to satisfy her obligations under *Celotex*, Navarro submitted four items of "evidence": (1) an "unverified report by Maurice Howes * * *, a 'metallurgical consul-

tant'"; (2) "a 1991 report by the American Iron and Steel Institute" (AISI) relating to corrosion; (3) a recall notice relating to the problem of undetectable rust in the suspension system that was issued by the company in 1990 (nine years after the vehicle involved in the accident was manufactured); and (4) a three-page affidavit of Crispin Hales, an engineering expert. Pet. App. 16a, 4a-5a, 8a.

The district court granted Fuji's motion for summary judgment. Pet. App. 11a-25a. As an initial matter, the court noted that in deciding whether Navarro had established a *prima facie* case, it could "consider only evidence which would be admissible at trial." *Id.* at 16a. The Howes report, the district court ruled, was unverified and unauthenticated and therefore inadmissible. *Id.* at 17a. Even if admissible, the district court added, the Howes report would "not have any bearing on whether Fuji knew or should have known about the defect, whether the defect caused Navarro's injury, or whether Fuji failed to use a reasonable standard of care." *Id.* at 18a.

The district court concluded that the 1990 recall notice and the AISI report were admissible but of very limited value in establishing a *prima facie* case. The 1990 recall notice, the court explained, "could only be used for the limited purpose of establishing that the car's suspension system was defective," but would "not be admissible to show that Fuji knew or should have known about the defect, or * * * failed to use a reasonable standard of care at the time relevant to this lawsuit, the 1981 date of manufacture." Pet. App. 16a. Similarly, the AISI report, although admissible, "contains little which could aid the trier of fact in proving any contested issue in the instant case" and "does not aid Navarro in her search for a *prima facie* case." *Id.* at 23a.

Turning to the three-page affidavit of Crispin Hales, the district court concluded that it was "inadmissible under Federal Rule of Evidence 702." Pet. App. 18a. Initially, the district court noted that the admissibility of expert

testimony is governed by this Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See Pet. App. 19a. Under *Daubert*, the court explained, experts "cannot float their conclusions on cushions of air; they must rest those conclusions upon foundations built from reliable scientific explanation." Pet. App. 19a. Hales's affidavit, however, failed to satisfy that requirement. For example, "Hales professes that Fuji knew of the defect in the suspension arm because it issued the 1990 recall notice but does not even attempt to show a basis for any such knowledge"; "states that the corrosion caused the failure of the suspension arm and the loss of control of the car" but "does not explain how [Hales] knows this"; and asserts that Fuji failed to apply the knowledge and skill ordinarily used by reasonably well qualified engineers but "makes no attempt to explain what that knowledge or skill would have been." *Id.* at 20a-21a. In addition,

> Hales states that Fuji was aware that users of the car could not detect the corrosion. Hales does not mention whether corrosion or problems with the suspension arm would be detectable during dealer-performed or other professionally-performed routine or scheduled maintenance. * * * Hales intuits that Fuji was aware of the levels of road salt and corrosion to which cars operating in the "Rust Belt" were exposed.

Id. at 20a-21a. Based on its extensive review of Hales's affidavit (see *id.* at 20a-22a), the district court thus concluded that it "sets forth no reliable foundation for its conclusions" and "do[es] not satisfy even a liberal reading of the *Daubert* requirements." *Id.* at 20a, 22a.

Having excluded Hales's affidavit as inadmissible, the district court stated that "[e]ven construing evidence and drawing inferences in favor of Navarro," petitioner had "failed to establish a *prima facie* case of negligent design." Pet. App. 25a. The district court accepted Fuji's alternative argument that, at most, the Subaru "simply wore out" and

that Fuji could not be held liable on that basis. *Id.* at 24a. The court explained:

> Both of Navarro's experts stated essentially that the car's suspension arm simply deteriorated over time. Even if the court were to accept those experts, neither expert's testimony would show that such wear occurred as a result of Fuji's negligence in 1981.

Ibid. Thus, the court entered summary judgment in favor or Fuji. *Id.* at 25a. Navarro's motion to alter or amend the judgment was subsequently denied. *Id.* at 26a.

3. A panel of the Seventh Circuit unanimously affirmed. Pet. App. 1a-10a. At the outset, the court of appeals explained that a negligent design claim under Illinois law is governed by an "objective" test that focuses on what "Fuji should have done about rust in light of what it should have known" in 1981. *Id.* at 3a. To demonstrate that the Subaru's rear suspension's design was defective, the court of appeals continued, Navarro was required to "show * * * that due care required Fuji to design the rear suspension in such a way that it either would not rust even if driven for many years in Chicago or, more plausibly, that if it did rust the rust would show so that the suspension could be replaced before it gave way." *Id.* at 4a.

The court then examined the four items proffered by Navarro in opposition to Fuji's summary judgment motion and considered whether they sufficed to establish a *prima facie* case of negligent design under Illinois law. The Howes report, the court first explained, was unverified and thus "properly ruled inadmissible" by the trial court. Pet. App. 5a; see also *ibid.* (stating as well that H. .es report "in any event added nothing material to the [Hale] affidavit"). As for the 1990 recall notice and AISI report, the court of appeals, like the district court, treated them as admissible but of very limited value. The recall notice, the court stated, "adds nothing to the [Hale] affidavit" because it "merely

shows that in 1990 (for there is no indication that Fuji discovered the problem earlier and sat on it) Fuji discovered the problem of undetectable rusting." *Id.* at 8a. And while the AISI report contained "some evidence that in the early 1980s Japanese cars were not as resistant to rust as American cars were," it contained no "evidence that the difference created an incremental hazard great enough to make the Japanese cars defective." *Ibid.*

Turning to the Hales affidavit, the court of appeals explained that the district court was "only half right in finding that [it] * * * flunked the *Daubert* test." Pet. App. 5a. Thus, Hales's examination of the accident vehicle, and his resulting explanation of "how the accident had come about" through "the insidious corrosion of the rear suspension," was fully admissible. *Id.* at 6a. Nevertheless, Hales's assertion that the rear suspension's design was negligent and unreasonable in 1981 was completely lacking in any support. *Id.* at 7a. The court of appeals explained:

> [A]t most the affidavit is evidence that Fuji should have known back in 1981 that its rear suspension might rust through in highly corrosive driving environments. There is no indication that responsible engineers at the time thought the hazard considerable because undetectable, and therefore worth guarding against and if so by what means, or that Fuji could have redesigned the suspension to avoid the hazard at a cost commensurate with the expected accident cost, which might reasonably have seemed slight — or indeed at any cost. The affidavit is silent about what auto manufacturers were doing about corrosion in 1981.

Ibid. Thus, the court of appeals rejected as not "grounded in * * * an expert study of the problem" and "nakedly conclusional" Hales's assertion that the Subaru's rear suspension had been negligently designed.

The court of appeals also rejected Navarro's contention that "the gaps in the expert's affidavit would have been filled if only [Fuji], before moving for summary judgment, had deposed the expert." Pet. App. 7a. "[T]here is no duty," the court explained, "to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit." *Ibid.* And finally, the court upheld the district court's denial of Navarro's post-judgment motion. *Id.* at 8a-9a.[1]

REASONS FOR DENYING THE PETITION

As the foregoing account of the proceedings below makes clear, the outcome of this diversity action turned, in the end, on the quantum of evidence presented by petitioner Navarro in support of her claim that Fuji acted negligently in 1981 when it designed the rear suspension of the accident vehicle. The district court ruled that Navarro's proffer failed to make out a *prima facie* case of design defect under Illinois law, and granted summary judgment to Fuji. A panel of the Seventh Circuit unanimously affirmed, again relying on a highly fact-intensive (and necessarily case-specific) examination of the evidence presented by Navarro to the trial court.

In an effort to transform the court of appeals' fact-bound ruling into one worthy of this Court's review, and ultimately to persuade this Court to hold this case pending the outcome of *General Electric Co.* v. *Joiner*, No. 96-188, the petition for certiorari targets the Seventh Circuit's determination that a certain portion of the affidavit of petitioner's expert was so conclusory in nature that it was properly ruled inadmissible by the trial court under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In petitioner's view,

---

[1] In dicta, the Seventh Circuit disagreed with Fuji's "alternative ground for upholding the district court's judgment, that the Subaru 'just wore out.'" Pet. App. 3a-4a.

this aspect of the court of appeals' decision gives rise to the following question presented:

> What is the standard of appellate review for trial court decisions excluding expert testimony under *Daubert* * * * in a summary judgment proceeding when the expert has never been deposed or voir dired by the trial court?

Pet. i. As we explain below, however, that question is not properly or squarely presented in this case; and, even if it were, the question could not possibly be answered in a way that would alter the result below. Accordingly, review should be denied.

1. The trial court in this case ruled that Hales's affidavit was inadmissible under *Daubert*. In affirming, the Seventh Circuit panel made no mention of the "abuse of discretion," "manifestly erroneous," or "heightened abuse of discretion" standards of review that petitioner maintains have been adopted by the various circuits. Pet. 4-5. Instead, the Seventh Circuit plainly applied *de novo* review to the district court's decision. The court of appeals made no effort to separate out the admissibility ruling (which petitioners say is reviewable only for manifest error in the Seventh Circuit) from the summary judgment ruling (reviewable *de novo*); instead, it applied *de novo* review to all issues in the appeal. Thus, the Seventh Circuit declared — without acknowledging any discretion in the trial court — that the district court "was only half right in finding that the expert's affidavit flunked the *Daubert* test." Pet. App. 5a. There is not the slightest trace of deference to the trial court's rulings in Chief Judge Posner's opinion for the panel.

Because the court of appeals applied *de novo* review to the trial court's rulings, petitioner could not possibly benefit from any resolution of the question presented. There is no more exacting standard of review than *de novo*. She has already benefited from *de novo* review of a decision that, it

must be remembered, was in Fuji's favor. It follows that the resolution of the question she presents (or for that matter any decision by this Court in *Joiner*) could not possibly change the outcome of this case. For that reason, review should be denied.

2. Review should also be denied because petitioner has waived any argument that she is entitled to a heightened standard of review under *Daubert*. In her court of appeals' brief, petitioner acknowledged that the district court's exclusion of Hales's affidavit was *reviewable under an abuse of discretion standard*. See Pet. C.A. Br. 1 (identifying pertinent issue on appeal as "[w]hether the District Court abused its discretion in finding that the affidavit of plaintiff's expert, Crispin Hales, Ph.D., was inadmissible"); *id.* at 8 (stating that the "trial court has broad discretion in ruling on the admissibility of evidence, including expert testimony," and noting that "the Court of Appeals will reverse in the event of an abuse of that discretion"); *id.* at 8-9 (arguing that exclusion of Hales's testimony was an "abuse of discretion"). Compare Pet. 4 (stating, inconsistently, that Seventh Circuit applies "manifestly erroneous" standard of review). Having conceded that an abuse of discretion standard governs the issue, petitioner has waived any right to claim a more exacting form of appellate review in this Court or the court below.

3. This case, moreover, does not cleanly present the admissibility question because the lower courts' discussion of admissibility was intertwined with their evaluation of whether the testimony contained in the Hales affidavit would (if admitted) establish a *prima facie* case. The district court, for example, not only ruled that Hales's affidavit was inadmissible but also stated:

> Both of Navarro's experts stated essentially that the car's suspension arm simply deteriorated over time. *Even if the Court were to accept those experts, neither expert's*

> *testimony would show that such wear occurred as a result of Fuji's negligence in 1981.*

Pet. App. 24a (emphasis added). In view of the district court's alternative holding that Hales's testimony, *even if admitted*, would not have sufficed to defeat summary judgment, the outcome in the trial court would be no different if Hales's testimony were ruled admissible.

Similarly, the court of appeals, in discussing the admissibility of Hales's affidavit, took pains to point out the lack of probative value of the inadmissible statements made in that affidavit. See Pet. App. 5a-8a. Thus, the Seventh Circuit opined that Hales's statement that Fuji was aware of the special corrosion problems in Chicago was "correct[] but inconsequent[ial]." *Id.* at 6a. In like manner, the court noted that Hales's assertion that Fuji knew that road salt could have a corrosive effect on the rear suspension "amounts to nothing more than the truism that a manufacturer of a steel product is charged with elementary knowledge that salt is corrosive." *Id.* at 7a. Because the Seventh Circuit strongly suggested that much of the inadmissible testimony of Hales was in any event of little or no probative value, it remains unclear whether the admissibility discussion was necessary to the court of appeals' holding. Under these circumstances, this Court should follow its usual practice of declining to review issues that were not squarely passed upon by the court below.

4. Review should also be denied because the Seventh Circuit's decision, insofar is it actually rested on the conclusion that a portion of Hales's affidavit was inadmissible, was plainly correct. As previously explained, the court of appeals concluded that certain portions of the Hales affidavit were admissible, thereby disagreeing with the district court's wholesale exclusion of the affidavit. As to other portions of the affidavit, the appellate court indicated that they were inadmissible but went on to explain why they nevertheless would not (if admitted) suffice to establish a *prima facie*

case. Indeed, the only statement in the Hales affidavit that the court of appeals said was "inadmissible, because nakedly conclusional," but which the court did not go on to say also fell short of a *prima facie* case, was Hales's assertion that the rear suspension's design in 1981 was "negligent and unreasonable." Pet. App. 7a, 8a.

That portion of Hales's affidavit, however, was obviously inadmissible because it consisted of nothing more than a bare assertion with respect to the ultimate issue in the case — whether the 1981 design was, in fact, the result of negligence. As the court of appeals correctly noted, the affidavit "contains no support" whatsoever for that "nakedly conclusional" statement, and "a conclusion without any support is not * * * entitled to the dignity of evidence." Pet. App. 7a, 8a. As the district court correctly explained, testimony of this kind cannot withstand "even a liberal reading of the *Daubert* requirements." *Id.* at 22a.

5. Petitioner makes a variety of other arguments that are either meritless or irrelevant to the sole question presented in the petition. See S. Ct. Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Thus, petitioner maintains that the result in this case would have been different if it had been brought in another jurisdiction. Pet. 5-9. In view of the fact-bound and case-specific nature of rulings on motions for summary judgment, that argument is difficult if not impossible to prove. In any event, the cases cited by petitioner do not lend any support to this contention.

Equally meritless is petitioner's repeated suggestion (see Pet. 4, 5-8, 10) that *Daubert* screening is unavailable, or rarely available, at the summary judgment stage or in the absence of a preliminary hearing under Rule 104(a) of the Federal Rules of Evidence. That argument is soundly refuted by *Daubert* itself, which teaches that trial courts "remain[] free to * * * grant summary judgment" when expert testimony is insufficient to raise a genuine issue of material fact.

509 U.S. at 596. And finally, petitioner is wrong to suggest (Pet. 9-10) that the Seventh Circuit's approach to *Daubert* issues is unduly strict or conflicts with *Daubert* itself. In any event, the only question presented in the petition has to do with the standard of appellate review, not how *Daubert* is applied by the trial court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY SINGER
ROBERT E. O'MALLEY
PAUL E. WOJCICKI
Segal McCambridge Singer & Mahoney Ltd.
Two First National Plaza
20 South Clark Street
Chicago, IL 60603
(312) 782-3800

KENNETH S. GELLER
ALAN E. UNTEREINER*
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

JOSEPH J. KUTER
Senior Counsel
Subaru of America, Inc.
Subaru Plaza
2235 Route 70 West
Cherry Hill, NJ 08034
(609) 488-8572

**Counsel of Record*